U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: February 15, 1990
CASE NO. 88-ERA-26

IN THE MATTER OF

JAAFAR HAMKA,
COMPLAINANT,

v.

THE DETROIT EDISON COMPANY,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER TO SUBMIT SETTLEMENT

Before me for review is a Recommended Order of Dismissal issued by Administrative Law Judge (ALJ) Daniel J. Roketenetz on October 10, 1989. That order recommended dismissal of the captioned case, which arises under Section 210 of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982). The basis for the ALJ's recommendation was a Stipulation of Dismissal submitted jointly by the parties to the ALJ, agreeing to a dismissal of the proceeding with prejudice.

This case was initiated on April 6, 1988, when Complainant filed a complaint with the U.S. Department of Labor, Wage and Hour Division, of unlawful discrimination under the ERA. After investigation, the Department determined that "the weight of evidence . . . indicate[d]" that a violation had occurred.

Respondent requested a hearing, which the ALJ continued upon the parties' motion pending receipt of the Stipulation of Dismissal. Signed by Jaafar M. Hamka, the

Complainant, his attorney, and an attorney representing Respondent, and dated October 6, 1989, the stipulation states:

> In consideration of having settled an action before the Michigan Wayne Circuit Court involving the parties to this proceeding and the Complainant herein no longer wishing to pursue the complaint in this case and the Respondent now being desirous of withdrawing its request for hearing in this matter, the parties, pursuant to the Federal Rules of Civil Procedure, Rule 41(a)(1)(ii), hereby enter into this stipulation of dismissal. It is expressly agreed by and between the parties hereto that the dismissal of this proceeding herein shall be with prejudice.

In his dismissal order, the ALJ recommended that the Secretary approve the stipulation, noting that the Department lacks jurisdiction over the state court proceeding.

Section 5851(b)(2)(A) of the ERA provides that "the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint." The settlement role taken by the Secretary is to review the terms of settlement agreed upon by the private parties to ensure that the settlement is fair, adequate and reasonable.

Under the stipulation submitted in the instant ERA proceeding, Complainant states that he no longer desires to pursue his ERA claim before me, and Respondent states that it desires to withdraw its request for a hearing. The agreed upon disposition is with prejudice, i.e., Complainant has agreed that his right to maintain his ERA claim is barred "[i]n consideration of having settled" a state court action. That "consideration" was tendered presumably means that Complainant received something of value in exchange for withdrawing his Federal claim. In these circumstances, I view Complainant as having settled his ERA claim in the instant proceeding.

No copy of any settlement agreement is included in the record, and it appears that an agreement was not submitted to or reviewed by the ALJ. In whistleblower cases under the ERA which

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are settled, it is error for an ALJ to dismiss a case without reviewing the terms of settlement and making a recommendation as to whether the settlement is fair, adequate and reasonable. 42 U.S.C. § 5851(b)(2)(A); 29 C.F.R. § 24.6(a) (1989). *Ryan v. Niagara Mohawk Power Corp.*, No. 87-ERA-47, Order to Submit Settlement Agreement issued August 9, 1989, slip op. at 2; *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9 and 10, Order to Submit Settlement Agreement issued March 23, 1989, slip op. at 1 and 2. The Secretary has held that such a case cannot be dismissed unless the Secretary makes such a finding. *Macktal v. Brown & Root Inc.*, No. 86-ERA-23, Order to Submit

Settlement Agreement issued May 11, 1987, slip op. at 2; *Johnson v. Transco Products*, Case No. 85-ERA-7, issued August 8, 1985, slip op. at 1; *Chan Van Vo v. Carolina Power and Light Co.*, Case No. 85-ERA- 3, issued April 12, 1985, slip op. at 1. *See Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 556 (9th Cir. 1989). Although it is not necessary that a settlement agreement be part of the final order, as the Secretary explained in *Macktal v. Brown & Root*, "[w]here a settlement is not fair and equitable to a complainant, I cannot approve it for to do so would be an abdication of the responsibility imposed upon me by Congress to effectuate the purpose of section 5851, which is to encourage the reporting of safety violations by prohibiting economic retaliation against employees reporting such violati[o]ns." Slip op. at 2.

In the interest of judicial economy, rather than remand this case to the ALJ to review the settlement and submit a new recommended decision, the parties are ordered to submit to me for review the terms of settlement including a copy of any settlement agreement. If all the parties, including the Complainant individually, have not signed a settlement agreement, the parties shall submit a certification or stipulation, signed by all the parties to the agreement, including the Complainant individually, demonstrating their informed consent. The agreement should be submitted within thirty days of receipt of this order.

SO ORDERED.

ELIZABETH DOLE
Secretary of Labor

Washington, D.C.